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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. EDWARD ANDREW LONG, Defendant and Appellant.	D073765 (Super. Ct. No. SCN360930)

APPEAL from a judgment of the Superior Court of San Diego County, Robert J. Kearney, Judge. Affirmed.

Michael Bacall, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Scott C. Taylor and Charles C. Ragland, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Edward Andrew Long of first degree murder (Pen. Code, §§ 187, subd. (a), 189) and found true the allegation that Long intentionally and personally

discharged a firearm causing death (*id*., § 12022.53, subd. (d)). The trial court sentenced Long to an indeterminate term of 50 years to life in prison.

Long appeals. He contends the trial court erred by (1) providing incomplete jury instructions regarding provocation and (2) admitting evidence regarding uncharged acts of domestic violence committed by Long. We disagree with these contentions and affirm.

FACTS

For purposes of this section, we state the evidence in the light most favorable to the judgment. (See *People v. Osband* (1996) 13 Cal.4th 622, 690; *People v. Dawkins* (2014) 230 Cal.App.4th 991, 994.) Additional facts will be discussed where relevant in the following section.

At the time of the murder, Long was in long-term romantic relationships with two women, Elizabeth Perez and D.D. Each woman did not know about Long's relationship with the other. On June 12, 2016, Perez was staying over at Long's house in San Marcos, California for the weekend. Perez found a box addressed to D.D., and Long and Perez began to argue. Perez was upset and locked herself inside her car in Long's garage. She filmed Long with her cell phone as he stalked around her car, tapping on the windows and hiding his face.

Long went into his house, retrieved a semiautomatic handgun, and shot Perez in the head. The bullet entered her right temple and exited near her left earlobe. She died within minutes.

Long drove to his father's house. He told his father that he and Perez were playing with a gun, Perez grabbed the gun, and it accidentally went off. Long's father told him to call the police, but Long did not agree. He said he was afraid of going to prison for the rest of his life.

After around two hours, Long returned home. Sitting on top of Perez's body, Long drove her car to a nearby freeway off-ramp, parked it on the shoulder, and walked home. He cleaned his garage of any broken glass and unsuccessfully searched for the spent bullet. He threw away his clothes, which were now covered in Perez's blood. He also threw away the handgun, but only after filing off its serial number and damaging it with a drill and hammer.

Long drove to his father's house again. He said he had made a "big mistake" and confessed to driving Perez's car to a freeway off-ramp and discarding the handgun. Long also told his father that he and Perez had been arguing before she was shot. Long laid on the floor to take a nap but eventually left. Long's father later contacted police.

A couple days later, Long met D.D. at a hotel in Redlands. The next day, they drove to Long's house in San Marcos. D.D. had been wanting to move to Las Vegas for some time. Long now suggested they make the move, and they left for Las Vegas (via D.D.'s home in Fontana) the same day. By this time, Long was under police surveillance, and he was later arrested in Las Vegas. D.D. did not know anything about Perez or the murder.

At trial, D.D. testified that Long had been physically abusive toward her approximately 10 times, including grabbing or punching her arms and leaving bruises.

On one occasion, Long strangled D.D. while he held her up against a refrigerator. Long became dizzy and was afraid for her life. On another occasion, Long strangled D.D. with both hands while she was on the floor. A blood vessel in her eye ruptured, and D.D. thought she was going to die. A couple times D.D. fled to her car to escape Long, and he responded by pounding on the windows and windshield with his fists.

Long had dated another woman, E.S., and he was physically abusive toward her as well. One night, he pulled out a large chunk of her hair and slammed her to the ground. A couple months later, during an argument, Long pinned her against a wall and held a knife to her throat.

Long testified in his own defense. He claimed he shot Perez accidentally. After Perez found the box addressed to D.D. and became upset, Long said he told her to go home. Perez went out to her car, and they continued to argue. Perez sounded her car horn, and Long was worried she would upset his neighbors. Perez began recording Long, so he started to do things to annoy and antagonize her. He eventually went into his kitchen and retrieved the handgun. He claimed he did not know it was loaded. He said he tapped the gun against Perez's window and told her, " 'Go ahead and record me. Here's something to record.' " He testified he must have pulled the trigger because the gun fired, killing Perez.

DISCUSSION

I

Jury Instructions on Provocation

A

Long contends the trial court erred by providing misleading instructions regarding provocation and the distinction between first degree and second degree murder. The court instructed the jury with the form jury instructions on murder (CALCRIM No. 520) and first degree murder (CALCRIM No. 521). The murder instruction recited the elements of murder, including both express and implied malice. It told the jury that a murder conviction is always murder of the second degree unless the jury makes the additional findings necessary for first degree murder as set out in CALCRIM No. 521. CALCRIM No. 521 instructed the jury that a first degree murder conviction required the prosecution to prove that Long acted willfully, deliberately, and with premeditation. It expressly cautioned the jury that the prosecution had the burden of proving the elements

of first degree murder, and it was the jury's duty to find Long not guilty of first degree murder if the prosecution did not meet that burden.[1]

Before instructing the jury on the lesser-included offense of voluntary manslaughter, the court explained the concept of provocation using CALCRIM No. 522. That instruction provided as follows: "Provocation may reduce a murder from first degree to second degree and may reduce a murder to manslaughter. The weight and significance of the provocation, if any, are for you to decide. [¶] If you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first or second degree murder. Also consider the provocation in deciding whether the defendant committed murder or manslaughter."

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1 CALCRIM No. 521, as used by the trial court, reads in full as follows: "The defendant is guilty of first degree murder if the People have proved that he acted willfully, deliberately, and with premeditation. [¶] A defendant acted willfully if he intended to kill. [¶] The defendant acted deliberately if he carefully weighed the considerations for and against his choice and knowing the consequences decided to kill. [¶] The defendant acted with premeditation if he decided to kill before completing the act that caused death. [¶] The length of time the person spends considering whether to kill does not alone determine whether the killing is deliberate and premeditated. The amount of time required for deliberation and premeditation may vary from person to person and according to the circumstances. [¶] A decision to kill made rashly, impulsively and without careful consideration is not deliberate and premeditated. On the other hand, a cold, calculated decision to kill can be reached quickly. The test is the extent of the reflection, not the length of time. [¶] The requirements of second degree murder based on express or implied malice are explained in [CALCRIM No.] 520, first or second degree murder with malice aforethought. [¶] That was the instruction I just read previously. [¶] The People have the burden of proving beyond a reasonable doubt that the killing was first degree murder rather than a lesser crime. If the People have not met this burden, you must find the defendant not guilty of first degree murder and the murder is second degree murder."

The court instructed the jury on voluntary manslaughter, on the theory of sudden quarrel or heat of passion, using CALCRIM No. 570. That instruction told the jury a killing that would otherwise be murder is reduced to voluntary manslaughter if a defendant killed because of a sudden quarrel or in the heat of passion. Under the instruction, a sudden quarrel or heat of passion requires that (1) "the defendant was provoked"; (2) "as a result of the provocation, the defendant acted rashly and under the influence of intense emotion that obscured his reasoning or judgment"; and (3) "the provocation would have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment."

CALCRIM No. 570 provided a further description of provocation in the context of voluntary manslaughter. It explained, "In order for heat of passion to reduce a murder to voluntary manslaughter, the defendant must have acted under the direct and immediate influence of provocation as I have defined it. [¶] While no specific type of provocation is required, slight or remote provocation is not sufficient. Sufficient provocation may occur over a short or long period of time. It is not enough that the defendant simply was provoked. The defendant is not allowed to set up his own standard of conduct. You must decide whether the defendant was provoked and whether the provocation was sufficient." The instruction placed the burden on the prosecution to prove "beyond a reasonable doubt that the defendant did *not* kill as a result of sudden quarrel or in the heat of passion." (Italics added.)

B

"A defendant challenging an instruction as being subject to erroneous interpretation by the jury must demonstrate a reasonable likelihood that the jury understood the instruction in the way asserted by the defendant." (*People v. Cross* (2008) 45 Cal.4th 58, 67-68; accord, *People v. Landry* (2016) 2 Cal.5th 52, 95.) " '[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.' " (*People v. Carrington* (2009) 47 Cal.4th 145, 192.) "Also, ' " 'we must assume that jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given.' " ' " (*People v. Sattiewhite* (2014) 59 Cal.4th 446, 475.)

Long argues that the jury instructions could have misled the jury into believing that, in order for provocation to reduce first degree murder to second degree murder, the third element of voluntary manslaughter based on sudden quarrel or heat of passion must have been satisfied. This element requires the jury to view the required provocation through an objective lens, i.e., that the provocation would have caused a person of *average disposition* to act rashly and without due deliberation.

Long's argument was considered and rejected in *People v. Jones* (2014) 223 Cal.App.4th 995 (*Jones*) and *People v. Hernandez* (2010) 183 Cal.App.4th 1327 (*Hernandez*). After reviewing the applicable law, *Jones* found that CALCRIM Nos. 520, 521, 522, and 570 were not misleading. It explained, "[The instructions] accurately inform the jury what is required for first degree murder, and that if the defendant's action was in fact the result of provocation, that level of crime was not committed. CALCRIM

Nos. 521 and 522, taken together, informed jurors that 'provocation (the arousal of emotions) can give rise to a rash, impulsive decision, and this in turn shows no premeditation and deliberation.' [Citation.] As the jury also was instructed, a reduction of murder to voluntary manslaughter requires more. It is here, and only here, that the jury is instructed that provocation alone is not enough for the reduction; the provocation must be sufficient to cause a person of average disposition in the same situation, knowing the same facts, to have reacted from passion rather than judgment." (*Jones*, at p. 1001.) Similarly, this court in *Hernandez* emphasized that CALCRIM No. 522 "plainly states the jury should consider provocation for *both* second degree murder and manslaughter. There is nothing in the instruction that suggests the jury might have failed to fully consider the provocation evidence for second degree murder based on a rejection of the evidence for manslaughter." (*Hernandez*, at p. 1335.)

Long criticizes the reasoning in *Jones* as unrealistically legalistic. He claims, "It is unrealistic to assume that a jury consisting of lay people could make the logical leap from the detailed instruction on the provocation to reduce murder to manslaughter to the conclusion that the provocation to reduce first degree murder to second degree is something different." We disagree. The court's jury instruction, CALCRIM No. 521, identified the specific elements the prosecution was required to prove in order to obtain a first degree murder conviction ("willfully, deliberately, and with premeditation") and defined those elements for the jury. If the jury believed that Long was provoked in a manner that would prevent it from finding those elements beyond a reasonable doubt, nothing in the court's other jury instructions prevented or misled the jury from doing so.

The detailed discussion of provocation in CALCRIM No. 570 applied only to voluntary manslaughter. There is no reasonable likelihood the jury believed this discussion applied to its consideration of first degree murder as well. We agree with *Jones* and *Hernandez* and conclude Long has not shown error.

In light of our conclusion, we need not consider whether Long forfeited his contention by failing to object or request a clarifying instruction in the trial court, as the Attorney General argues. (See *People v. Hardy* (2018) 5 Cal.5th 56, 99; *Jones*, *supra*, 223 Cal.App.4th at p. 1001.) We likewise need not consider whether Long's counsel was ineffective for failing to object to the instructions.

To the extent Long claims his counsel was ineffective for failing to request a clarifying instruction, we conclude he has shown neither deficient performance nor prejudice. (See *Strickland v. Washington* (1984) 466 U.S. 668, 687; *People v. Hart* (1999) 20 Cal.4th 546, 623.) "Tactical errors are generally not deemed reversible; and counsel's decisionmaking must be evaluated in the context of the available facts." (*Hart*, at p. 623.) Where, as here, the record does not disclose why counsel acted in a particular manner, we will affirm the judgment " 'unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation.' " (*Id.* at pp. 623-624.) Long's counsel made the reasonable decision to focus the jury on involuntary manslaughter, consistent with Long's testimony that the shooting was accidental, and argue voluntary manslaughter as an alternative option. Long has not shown his counsel acted improperly by refusing to propose an additional jury instruction that would detract from these options and highlight instead the possibility of a second

degree murder verdict, especially since the court's jury instructions were already legally correct. (See *Jones*, *supra*, 223 Cal.App.4th at p. 1002 [no deficient performance where counsel chose to focus on theory of mistaken identity rather than provocation]; see also *People v. Castillo* (1997) 16 Cal.4th 1009, 1015 [no deficient performance where court's jury instructions "fully apprised the jury of the law"].) Moreover, even if Long's counsel rendered deficient performance, Long has not shown prejudice. His argument relies on the proposition that the court's jury instructions were misleading. We have rejected that proposition. Long's claim of prejudice fails for the same reason.[2]

II

Evidence of Uncharged Acts of Domestic Violence

Long contends his constitutional right to due process of law was violated by the admission of testimony from D.D. and E.S. describing uncharged acts of domestic violence. The Evidence Code contains a general prohibition on the admission of evidence of a person's character or trait (including specific acts) when it is offered to prove the person's conduct on a specified occasion. (Evid. Code, § 1101, subd. (a).) But

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2 We note additionally that the evidence for provocation was weak. Prior to the murder, Long and Perez were arguing, but she retreated to her car. The videos Perez captured on her cell phone allowed the jury to assess Long's demeanor at that time, and neither the prosecution nor the defense argued that Long appeared agitated. Instead, the prosecutor told the jury that Long appeared calm. And Long's counsel told the jury that Perez did not seem afraid and was not aware a shooting was about to occur. Moreover, Long did not testify he shot because he was provoked, and he did not tell his father in the immediate aftermath of the shooting that he was provoked. In both contexts, Long claimed the shooting was accidental. Based on our review of the record, there is no reasonable probability an additional instruction on provocation would have resulted in a more favorable outcome for Long.

an exception to the general prohibition exists for certain types of evidence, including acts of domestic violence. (*Id.*, § 1109, subd. (a)(1).) The trial court relied on that exception to admit the testimony at issue here.

Our Supreme Court has concluded, in the analogous context of sexual offenses, that this exception does not violate principles of constitutional due process. (*People v. Falsetta* (1999) 21 Cal.4th 903, 922 (*Falsetta*).) The Courts of Appeal have extended this reasoning to acts of domestic violence. (See *People v. Johnson* (2010) 185 Cal.App.4th 520, 529 (*Johnson*) [collecting cases].)

Long does not attempt to distinguish *Falsetta* or its progeny. Instead, he asks this court to "reexamine" *Falsetta* to determine whether defendants' due process rights have been adequately protected in the intervening years. But it is not our function to engage in such reexamination. "Under the doctrine of *stare decisis*, all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction. Otherwise, the doctrine of *stare decisis* makes no sense. The decisions of [the California Supreme Court] are binding upon and must be followed by all the state courts of California. . . . Courts exercising inferior jurisdiction must accept the law declared by courts of superior jurisdiction. It is not their function to attempt to overrule decisions of a higher court." (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Although we may conclude under certain unusual circumstances that a Supreme Court opinion has been impliedly overruled by later trends in jurisprudence (see, e.g., *Newport Beach Country Club, Inc. v. Founding Members of Newport Beach Country Club* (2006) 140 Cal.App.4th 1120, 1131), such circumstances are not present here.

Since it was decided, *Falsetta*'s reasoning has been repeatedly endorsed by the Supreme Court and Courts of Appeal. (See, e.g., *People v. Merriman* (2014) 60 Cal.4th 1, 46; *People v. Wilson* (2008) 44 Cal.4th 758, 797; *Johnson, supra*, 185 Cal.App.4th at p. 529.) Long provides no reason to depart from this consensus. He claims that "[p]ropensity evidence under [Evidence Code] section 1109 is rarely excluded," but the authorities he cites do not support that claim. Moreover, it is unclear how that claim would affect our obligation to follow *Falsetta*. We reject Long's request to "reexamine" *Falsetta*, and find his arguments in support of this request unpersuasive.

DISPOSITION

The judgment is affirmed.

GUERRERO, J.

WE CONCUR:

HUFFMAN, Acting P. J.

AARON, J.